No. 86-823

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

MOBIL OIL CORPORATION,
Petitioner,

v.

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,
Respondent.

BRIEF OF AMICUS CURIAE, FLORIDA LAND TITLE ASSOCIATION, INC., IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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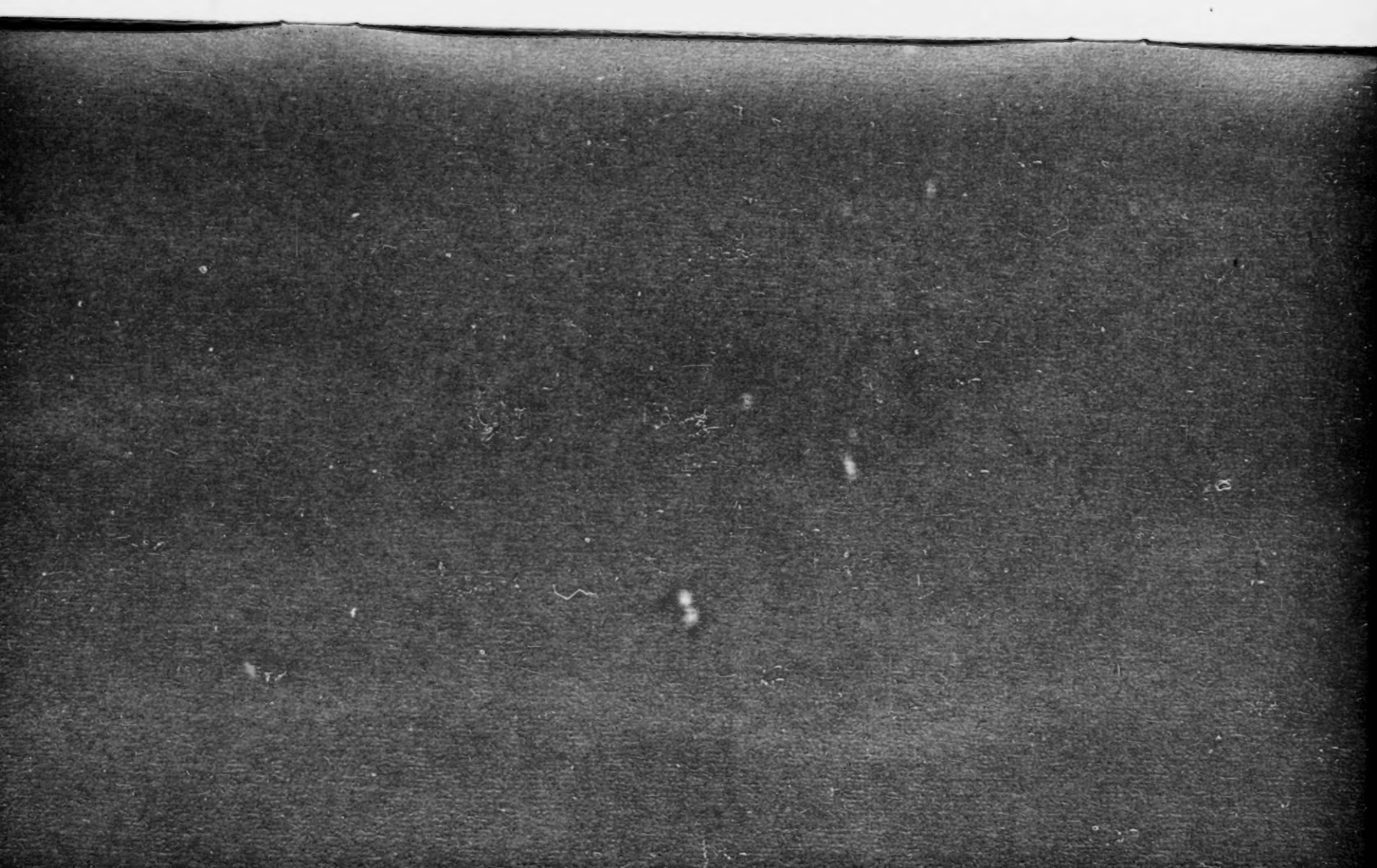

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AMICUS CURIAE'S INTEREST IN THIS CASE

Florida Land Title Association, Inc. ("FLTA") is a nonprofit membership corporation composed of more than 350 abstracters, title insurance companies and title insurance agents doing business in Florida. The services rendered by FLTA members are designed to facilitate title transactions and assure real estate transferees that their interests will be secure from third party claims.

FLTA has an interest in this case because of the drastic adverse effect the Florida Supreme Court's decision will have on (1) FLTA's members and the title industry generally, (2) owners of two-thirds of all privately held real property in the state of Florida, (3) the continued viability of the conveyancing system, and (4) the marketability and market value of all real property.

The decision below ravages the security of public deeds and the rules of law upon which the structure of private conveyancing depends. If allowed to stand, it will throw Florida conveyancing into massive turmoil and necessarily subject title insurance companies to incessant claims upon their resources and possible bankruptcy—and this by exposing them to the very kind of risks against which Florida's marketable record title act had promised them protection.

The Conveyancing System

The system of conveyancing in the United States efficiently protects transferees of interests in real property against losses from title defects. It is so effective that litigation involving *substantive legal* issues relating to title has become rare.[1]

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[1] Reichman, *Toward a Unified Concept of Servitudes*, 55 S. Cal. L. Rev. 1177 (1982).

Although the system producing this dramatic result is complex in detail, the essential components are (1) recording laws, (2) public land records implementing those laws, (3) curative statutes, (4) a tradition of sound and unambiguous property laws on which sellers and purchasers have been able to rely, and (5) the specialized services provided by title insurance companies.

Recording Laws and Land Records

Recording laws cut off most interests in real property that are not evidenced by or inferable from recorded instruments. Under these laws, a system of public land records has evolved that permits determining with a high degree of accuracy whether the title of a transferee will be free from third party claims.

At common law, the title history of any parcel of land *had to be* traced to its origin, but this system proved manifestly unworkable because few titles can be traced that far. Old breaks in the chain are common. Without recording and curative statutes any break in a chain of title, however minute, could cast a perpetual shadow over all future land transfers. Breaks become harder to cure as time passes. Possible claimants who might sign quit claims become impossible to locate, the physical condition of the property changes,[2] memories of witnesses fade, and other available evidence decays. Curative statutes eliminate most

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[2] This Court is in a poor posture to evaluate the work of those surveyors of many decades past. It can only be accepted that they did their job as instructed and recorded what they found then, which may or may not be what appears now. Fresh water lakes and ponds do change rather significantly because of both natural and artificial alterations in the areas involved. It is to be observed that governmental conveyances were made in reliance on them and the grantees of such conveyances had the right to assume the U.S. Government and the Trustees were acting lawfully.

Mobil Oil Corporation v. Coastal Petroleum Company, 2 Fla. Supp. 2d 12 (Fla. 10th Cir. 1982), *citing*, *Odom v. Deltona Corp.*, 341 So.2d 977, 984 (Fla. 1977).

of these risks and the complex and pointless title litigation that would be generated in their absence.

Marketable Record Title Laws

One key to an efficient system of conveyancing is the marketable record title act. The basis of marketable title acts is described by Professor Barnett[3] as follows:

> Marketable title acts are intended to operate in conjunction with, rather than as a substitute for, the recording Acts. They seek to extinguish old title defects automatically with the passage of time. The Acts provide that if a person has an unbroken chain of title from the present back to his "root of title," then he has the sort of title in favor of which their extinguishment feature will operate. His "root of title" is the most recent transaction in his chain of title that has been of record at least forty years.[4]

The effectiveness of marketable record title acts depends on the scope of their coverage. In a state like Florida, where huge portions of the land are traced to sovereign grants, they would be of no effect whatsoever if they did not cut off *governmental* as well as private interests. It is scarcely of any comfort to a prospective buyer that the challenger to his or her title is a well-financed public official instead of an ordinary private party.

The Role of Title Insurance

A sound system of conveyancing requires more than well conceived recordation and marketable record title acts. It also depends upon the expertise of the private parties who operate

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[3] Barnett, *Marketable Title Acts—Panacea or Pandemonium*, 53 Cornell L. Rev. 45, 52-53 (1967).

[4] The 40-year period is most common and is the one used for illustrative purposes throughout this article. [Florida has a 30-year period, Fla. Stat. § 712.02 (1985)] (Footnote in original)

the system. The mission of title insurance companies and allied firms is to provide the services needed to ascertain the state of titles from the public records. The key to understanding the industry is the recognition that insurance is sold primarily to bond the services the industry provides. The individual buyer or seller knows little about the intricacies of title examination, and cares less. What he or she desires is an assurance that title work done by professionals is correctly done. As private owners cannot inspect or supervise the work themselves, title insurance companies provide them with a guarantee in the form of insurance about the state of title. Title companies provide information as to clouds on titles, which can be cured *before* a transaction goes forward. Title companies bond the effectiveness of their services by agreeing to pay money if a further defect in title emerges.

The Instant Case

The system of title insurance, the level of premiums collected, and the services title companies provide, depend totally upon the integrity of the recordation system and the marketable record title acts. The decision of the Florida Supreme Court, if allowed to stand, will throw the entire mechanism into total disarray. Under it, the state will be able to challenge its own conveyances made 100 years ago or more because it will no longer be bound either by its own classification system or by deeds made by Trustees of its Internal Improvement Fund. The confusion will be statewide. More than 20 million acres of valuable land were sold by the state as swamp and overflow lands in the years between 1850 and 1918. The state's own Department of Natural Resources estimates that 11,900 miles of river and 3736 lakes are subject to these belated state sovereignty claims. Yet the evidence of navigability on which *every* single claim rests is not ascertainable by metes and bounds. Quite the

opposite, it depends on one hundred year old history, on the physical condition of the property in 1845 when Florida came into the Union. The evidence needed to adjudicate these claims decayed at a rapid rate, spurred on by each flood and storm, and by each expansion or contraction of river course or channel. The administrative costs of *re*determining the condition of any particular parcel 140 years ago will be high, and the reliability of any such determination is certain to be low. The decision below maximizes uncertainty for uncertainty's sake.

Virtually all of these cases involve land for which title insurance has been issued, so that FLTA members will be required to foot a large part of the bill for a set of risks from which they (and their insureds) had been promised protection by the MRTA.[5] The state of Florida estimates that it will spend as much as $900 million dollars to establish its claims if only 25 percent of the affected landowners decided to mount a defense. That money will have to be raised by taxation, much of it from the same individuals who will be forced to spend (as a first approximation) $900 million dollars of their own money to defend these claims.[6] Much of this money will come from title insurance companies, who may well be saddled with extensive indemnity payments in cases they lose.

Nor do matters rest here, for the incentive effects of the decision must be taken into account as well. Until these matters

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[5] It is well understood today that no system of insurance can function in the face of common mode failures, which make it impossible for insurers to diversify the risks of their policyholders. *See* Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. Legal Stud. 517, 534-539 (1984). Here there is a high correlation of insurer risks because all of these lawsuits stem from the same retroactive reinterpretation of the state's marketable title acts.

[6] The likely estimate would be more if only because each individual owner would have high start up costs because of the need to engage separate counsel.

of title are resolved on a case by case basis, the sale of real estate will come to a grinding halt as buyers and sellers find themselves unable to agree on how to allocate the ever-present risk of government suit. Trade and commerce will be paralyzed while the state of Florida continues its quixotic effort to right wrongs which in all probability never occurred. In the process, these claims will threaten the lifeblood of commerce and the financial viability of the title industry. The industry's only crime has been to rely on the state's promise that MRTA meant what it said. No company has charged a penny in premiums to cover the risk of the state's illegally reneging on its own conveyances.

Threat to Industry Survival

It is not an overstatement to suggest that the Florida Supreme Court's dramatic reversal of prior decisions promising security of titles threatens the economic survival of title insurance companies in Florida whose aggregate reserves and capital are far less than the amount Florida expects to spend in prosecuting claims against persons title companies have insured. The decision of the court has created a madcap situation in which everyone but lawyers and bureaucrats will lose. The time to set the matter aright is before more wasteful and destructive litigation takes place. That time is now.

ARGUMENT

A. *Introduction*

Petitioner's brief discusses the three drastic changes in state law wrought by the decision of the Florida Supreme Court.[7]

[7] The changes made by the decision (1) permit the state to reclassify land conveyed over 100 years ago as swamp and overflow land, (2) abrogate the doctrine of estoppel which was formerly available to prevent the state from reneging on its deeds, and (3) re-interpret the MRTA as never having applied to sovereignty land.

Petitioner has focused primarily on the court's refusal to recognize the conclusiveness of the classification decisions made by the Secretary of the Interior and the State of Florida when the land was originally sold. We agree with petitioner that, by opening the door to reclassification, the Florida court has "taken" petitioner's property. But we focus our argument primarily on the court's cavalier abrogation of the security of titles that the state guaranteed through the MRTA, as it had been construed in earlier Florida Supreme Court decisions.

1. *The Florida Marketable Record Title Act*

One question before the Florida Court was whether the MRTA, as enacted in 1963[5], applied to state grants. The issue arose when the Trustees contended that, 100 years ago when most of these deeds were made, they had authority to convey only Swamp Lands but were then without power to convey sovereignty lands. If the MRTA applied, the Trustees are foreclosed from attacking the validity of their prior deeds on any ground not specifically reserved in the deeds themselves. If MRTA did not apply, Florida will be able to attack *all* previous grants made by the Trustees.

Section 712.02 of the MRTA provides that any person whose claim of title is based on a title transaction that has been of record over thirty years has a marketable record title free of all but enumerated claims. Section 712.04 extinguishes all claims not specifically excepted (including "governmental" claims) that pre-date the thirty-year period. One exception is made for interests of the state or federal government "reserved" in the patent or deed by which the state or federal government parted with title.

[5] Fla. Stat., Ch. 712 (1963).

This case involves state claims to interests that were not reserved in the deeds by which the state parted with title.

In 1978, the MRTA was amended to except *for the first time* the state's claim of title to lands beneath navigable waters that the state had acquired when it was admitted to the Union.[9] The Trustees have asserted that the lands at issue in this case are sovereignty lands and that the state's claim was not extinguished by the MRTA.

2. *Decisions of Florida Lower Courts*

The trial court[10] and the district court of appeal[11] determined, as a matter of law, that the lands in this case could not be regarded as sovereignty lands; consequently, the 1978 exemption could not apply. They went on to hold that, even if the lands were sovereignty lands, the 1978 sovereignty lands exemption could not be retroactive because a retroactive application would unconstitutionally deprive property owners of rights that vested when the MRTA became effective in 1963.[12] Thus, the lower courts concluded that, even if the lands were sovereignty lands, the MRTA extinguished the state's claim.

3. *Decision of the Florida Supreme Court*

The Florida Supreme Court reversed the lower court decisions and held that the MRTA never applied to sovereignty lands. In a strangely casual opinion, over a strong dissent, the majority *sub silentio* found that the MRTA, as originally enacted,

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[9] *See* 1978 Fla. Laws, Ch. 78-288.

[10] *Mobil Oil Corporation v. Coastal Petroleum Co.*, 2 Fla. Supp. 2d 12 (Fla. 10th Cir. 1982).

[11] *Coastal Petroleum Co. v. American Cyanamid Co.*, 454 So.2d 6 (Fla. 2d DCA 1984) and *Board of Trustees of the Internal Improvement Trust Fund v. Mobil Oil Corporation*, 455 So.2d 412 (Fla. 2d DCA 1984).

[12] *See* 454 So.2d at 9.

did not apply to state grants. In arriving at this result, the court overruled its own precedents, changed its interpretation of Florida Statutes, and, by judicial fiat, took private property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

B. *The Fifth and Fourteenth Amendments to the United States Constitution Apply to State Judicial Acts*

This case raises the fundamental question of whether, even though a state is prevented by the Constitution from taking private property by action of its legislature or executive, it may achieve the same result, free of constitutional restraint, by acting through its courts. The Fifth Amendment command "nor shall private property be taken for public use, without just compensation" has long been held applicable to states through the Fourteenth Amendment. On its face, the Fourteenth Amendment imposes a *general* prohibition, binding on *all* branches of state government, not only the executive and the legislative.

What scant precedents exist support the basic proposition that *any* state judicial action which takes private property is subject to the same constitutional limitations that apply to other state agencies.

An early application of the taking and due process clauses to judicial action is in *Muhlker v. Harlem Railroad Co.*, 197 U.S. 544 (1905). Plaintiff in that case claimed an easement of light and air over a public street under an 1827 deed. Prior decisions of the New York Court of Appeals had held that similar deeds prevented railroads from building their tracks above grade without paying compensation to holders of the easements. When the New York court tried to distinguish its own precedents, this Court examined the soundness of the court's reasoning. Finding

that the purported grounds of distinction were frivolous, it intervened and held that vested rights are explicitly protected from judicial as well as from legislative confiscation.

The same logic underlies Justice Stewart's concurrence in *Hughes v. Washington*, 389 U.S. 290 (1967), where a private landowner brought an action to establish his ownership of accretions on oceanfront property. The Washington Supreme Court, holding that state law controlled, found for the state. Eight members of the Court resolved the issue in favor of the private owner on the ground that federal law governed. Only Justice Stewart's concurrence addressed the issue which this case puts squarely before the Court. In Justice Stewart's view, even if state law did apply, the Washington court's prior judicial decision had vested title in the landowner exactly as a statute would have done. Justice Stewart observed that the state could not abrogate the landowner's title by judicial action:

> [T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and less when a taking is unintended than when it is deliberate, I join in reversing the judgment.

Id. at 297-298.

Justice Stewart's concurrence in *Hughes* was followed by the Ninth Circuit decision, *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), *vacated and remanded on other grounds*, ____ U.S. ____, 106 S.Ct. 3269 (1986). *Robinson* involved ownership of water rights to certain "normal daily surplus water"

which had been obtained under a land grant. In the course of litigation during the 1920s and 1930s, Robinson's title to the water rights had been established by authoritative decisions of the Hawaii courts. Long after those decisions, the Hawaii Supreme Court *sua sponte* overruled all prior water law cases, adopted the English view of riparian rights and held that there was no category of normal daily surplus water of the kind Robinson claimed. The Ninth Circuit was faced with the question of whether the state could validly revoke Robinson's water rights by a judicial decision that negated the entire general property rights regime under which his rights had been fully and lawfully vested. The Ninth Circuit found the Hawaii court's decision constitutionally repugnant:

> The state conceded at oral argument that the Fourteenth Amendment would require it to pay just compensation if it attempted to take vested property rights. The substantive question, therefore, is whether the state can declare, by court decision, that the water rights in this case have not vested. The short answer is no.
>
> *Id.* at 1473.

The long answer is every bit as instructive.

> The parties concede that the State of Hawaii has the sovereign power to change its laws from time to time as its legislature may see fit, and may, by changing its law, radically change the definitions of property rights and the manner in which property rights can be controlled or transferred.
>
> The state may also change its laws by judicial decision as well as by legislative action. Insofar as judicial changes in the law operate prospectively to affect property rights vesting after the law is changed, no specific federal question is presented by the state's choice of implement in changing state law. See *Hughes v. Washington*, 389 U.S. 290, 295 (1967) (Stewart J. concurring).
>
> We assume, therefore, for the purposes of this case, that the Supreme Court of Hawaii was acting well within its

> judicial power under the state constitution when it overruled earlier cases and declared for the first time, after more than a century of a different law, that the common law doctrine of riparian ownership was the law of Hawaii. This declaration of a change in the water law of Hawaii may be effective with respect to the real property rights created in Hawaii after the *McBryde I* decision became final. New law, however, cannot divest rights that were vested before the court announced the new law. See *Hughes*, 389 U.S. 295-98.

Id. at 1474.[13]

As a matter of constitutional principle, the law must be as Justice Stewart and the Ninth Circuit have described it. Consider the law of adverse possession. Suppose that an authoritative judicial decision has established that an adverse possessor can obtain perfect title even when he knows that his own claim is made in bad faith. A bona fide purchaser takes title in reliance on the rule. The highest state court wishes to change that rule to provide that only good faith possessors can perfect title. This leaves the bona fide purchaser in the position of having to litigate the issue of whether his predecessor acted in good faith. The court may surely change the rule prospectively. But, consistent with the requirements of the due process and just compensation clauses, it cannot do so retroactively where the effect would be to plunge into uncertainty the very titles that it own laws had vested.[14]

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[13] *See also N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (First and Fourteenth Amendments limit the state's common law of defamation).

[14] We recognize that the State of Florida could insert a term in its grants reserving the right to challenge the title of the grantee or his assignee, even in perpetuity. Yet there is a tremendous functional difference between the prospective and retroactive adoption of this practice. In the prospective case, powerful economic constraints would discipline state practice. It would have to find a buyer, willing to pay a decent price, despite so onerous a constraint. But this economic restraint on public behavior would be wholly inoperative if Florida could repudiate its grants after the deeds are signed, sealed and delivered. If set free from constitutional constraint, Florida would no longer need to fear the price of its own political decisions. It could impose the costs upon innocent grantees by conduct which is every bit as

This case presents this stark issue of constitutional principle in relation to a judicial abrogation of titles vested under the MRTA. To date, an unanswerable concurrence by Justice Stewart and an unanimous decision by the Ninth Circuit are the only judicial opinions which support the indubitable proposition that the state cannot so alter its general rules of property law to defeat rights vested under a prior rule. This case offers the Court the opportunity to remove any lingering doubts on what should be an incontrovertible proposition of constitutional law. It remains only to demonstrate that Florida has overruled its decisive precedents holding that MRTA does apply to state grants.

C. *The Decision of the Florida Supreme Court has Taken Petitioner's Property by Overruling or Ignoring the Applicable Precedents Under Which Its Rights Had Become Fully Vested.*

1. The general principles of taking law do not allow the state to place an owner's vested rights at risk without any compensation or police power justification.

This Court has stressed repeatedly that it has not been able "to develop any 'set formula' for determining when compensation should be paid," and has relied on essentially "ad hoc

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outrageous as the behavior of the State of Georgia, condemned in *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87 (1810) (holding under the contracts clause that the legislature without compensation could not rescind its prior grants after the subject property had been conveyed to third parties who took in good faith) and of New Hampshire, condemned in *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (contracts clause prohibits state from revoking or modifying its charter without compensation). While both *Dartmouth College* and *Fletcher* were decided under the contracts clause, the principles involved in those cases are identical to those applicable here. If a state can acquire vested rights by demand, it diminishes the rights of the individuals whom it oppresses and destroys the productive capacities of our people generally. Land grabs offer the paramount abuse against which the taking and due process clause guards. The need for vigilence does not cease because the source of oppression is state judicial action.

factual inquiries" to resolve this difficult issue. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). In essence, modern taking doctrine has been a delicate counterpoint in which the degree of restriction imposed on an owner's rights is balanced against the strength of the justification the state offers for its action. No such need for balancing infects this case which lies at the extreme end of the legal spectrum: if Florida and Coastal prevail, petitioner's *entire interest* is destroyed. This case does not involve *any* comprehensive scheme of social or environmental control, such as the historical landmark designation statutes upheld in *Penn Central*. Petitioner has not contested the state's right to impose necessary regulations to protect its wetlands or the environment. Quite the contrary, all that is at stake in this case is ownership of mineral interests of the very sort that received emphatic constitutional protection in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). What Florida and Coastal seek is money[15] for minerals previously mined.

2. The Florida Supreme Court's reinterpretation of the Marketable Record Title Act amounts to an unconstitutional taking of vested property rights.

Amicus recognizes that this Court cannot superintend every detail of state law to determine whether a decision has deprived litigants of property rights secured by the Constitution. Yet, by the same token, state courts cannot be subject to constitutional scrutiny only where, as in *Robinson* and *Hughes* (but not *Muhlker*), they have *expressly admitted* to abandoning previous systems of property rights. A state court that overrules its prior decision *sub silentio* should be subject to the same standards of

[15] "Contrary to the various suggestions that the present cases pertain to issues of environmental protection, it should be made known that what these cases involve is money." *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So.2d 339, 349 (Fla. 1986) (Boyd, C. J., dissenting).

review as courts that have acted openly. There is no reason to encourage states to obscure the basis of their decisions in order to immunize their actions from review. This Court can surely review state decisions for impermissible retroactive takings when they have *no* colorable basis in law or in fact.

The most obvious illustration of that principle is here, where the Florida court has falsely dismissed its own binding precedent as "irrelevant dicta." The dispositive case is *Odom v. Deltona Corp.*, 341 So.2d 977 (Fla. 1976), there the Florida Supreme Court construed the 1963 MRTA which had been passed in response to the great uncertainty that existed with respect to land titles in Florida. MRTA's provisions expressly applied to all conveyances, private or *governmental*.[16] In *Odom* the court held that "the claims of the Trustees to beds underlying navigable waters previously conveyed [were] extinguished by the Act." *Id.* at 989. Here the Florida Supreme Court offered *no* reason to distinguish *Odom*. It characterized *Odom* in the following statement:

> The ground on which *Odom* rests is this factual determination that small lakes and ponds at issue were non-navigable, non-sovereignty lands. Unfortunately, even though this factual determination controlled and resolved the case, we went on to answer irrelevant arguments put to us by the parties and in answering one such argument concluded that MRTA was applicable to sovereignty lands encompassed within conveyances of swamp and overflowed lands and that the claims of trustees "to beds underlying navigable waters previously conveyed are extinguished by the Act."[17]

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[16] "[M]arketable record title shall be free and clear of all estates, interests, claims or charges *whatsoever* ... held or asserted by a person ... whether such person is natural or corporate, or is private or *governmental* ... except any right, title or interest reserved ..." Fla. Stat., 712.04 (1985) (emphasis added).

[17] *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So.2d 339, 344 (Fla. 1986), *citing*, 341 So.2d at 989.

This passage grossly misstates not only the facts found in *Odom*, but also the principles of law the *Odom* court applied to those facts.

(1) Facts: The Florida Supreme Court's description of the facts in *Odom* is manifestly false. In *Odom*, the court had taken the unusual step of reprinting the entire opinion of the trial court because of its "clarity." The trial court had granted a motion for summary judgment against the state because there was "no genuine issue of fact" 341 So.2d at 349. In this case, the Florida court writes as though summary judgment had been awarded because *Odom* clearly involved lands known to be non-sovereignty and non-navigable. But in *Odom* the findings were diametrically opposite to the facts in the revisionist description of them contained in the opinion below. The trial court's Finding Number 2 notes that the disputed lands were "certain non-meandered lakes and ponds." The rival claims of title were then noted by the trial court as follows:

> Deltona claims to own the lakes in question under various chains of title originating either in U.S. Patents or deeds of the Trustees of land acquired by the state under the Swamp and Overflow Lands Grant Act of September 28, 1950 [sic]. The Trustees claim that the lakes were the waters, beds and shores of navigable water which are held by the state in trust for the public by virtue of state sovereignty.

Id. at 979.

The entire point of *Odom* is that the court was able to grant Deltona its summary judgment *without* having to resolve the factual question of whether the lands acquired from the state were sovereignty or swamp lands. Deltona won *either* because it had good title to swamp land *or* because MRTA blocked the state's claim to retain sovereignty land. Mobil's position is indistinguishable from Deltona's. Accordingly, under *Odom*, the entire dispute in the instant case should have been resolved on the

face of the pleadings. Nothing could be clearer. Even the Trustees recognized the factual record that the Florida Supreme Court later denied: "It is also clear that the Circuit Court in *Odom* made no factual determination of the navigability of the lakes in issue." (Trustees' brief, Fla. Sup. Ct., at page 26.)

(2) Law: In *Odom*, after an extensive review of the relevant authorities, the Florida Supreme Court wrote:

> It seems logical to this Court that, when the Legislature enacts a Marketable Title Act, as found at Chapter 712, Florida Statutes, clearing any title having been in existence thirty years or more, the state should conform to the same standard as it requires of its citizens; the *claims of the Trustees to beds underlying navigable waters previously conveyed are extinguished by the Act.* Stability of titles expressly requires that when lawfully executed land conveyances are made by public officials to private citizens without reservation of public rights in and to the waters located thereon, a change of personnel among elected state officials should not authorize the government to take from the grantee the rights which have been conveyed previously without appropriate justification and compensation.

Id. at 989 (emphasis added).

The nature of the court's decision in this case is revealed, not only by the court's disingenuous reasoning, but by the political context in which the decision was rendered. The decision was in fact a belated response to eight years of supplication by the executive branch of the state government. In 1978, reacting to the court's *Odom* decision, the Governor called a special session of the legislature to amend the MRTA in order to exempt sovereignty lands from its operation. This 1978 episode is in itself well nigh conclusive evidence that the 1963 legislature meant what it said: the 1963 Act applies to sovereignty lands. Why else introduce the 1978 bill at all? Following well settled Florida precedent, the trial and intermediate appellate courts uniformly refused to give the 1978 amendment retroactive effect.

Political pressures continued to build.[18] In the spring of 1986, a concerted movement again developed to have the legislature "declare" that the MRTA had never applied to land under navigable waters previously conveyed by the state. That legislation was strenuously opposed on the very ground that the FLTA urges here: that such an amendment would constitute a taking of private property for public use without just compensation. The Florida Supreme Court's decision spared the legislature the necessity of voting at all on this issue. But the fact that the state acted through its courts rather than its legislature does not lift the large constitutional cloud that hangs over the decision. No verbal legerdemain can conceal the gross misreading that the Florida Supreme Court made first of MRTA and then of its own dispositive precedent in *Odom*. Its assault on vested rights cannot be corrected by the political process,

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[18] A news item in the Florida Times-Union on May 22, 1985, sixteen days after oral argument before the Florida Supreme Court in the instant case, explains the situation:

> "The state will never abandon these lands" [Governor] Graham said. "It is time for the Legislature to tell the courts, in no uncertain terms, that we intend to keep our sovereign lands, that we never gave them up and that we will not tolerate this abuse of the law."

Florida Times Union, May 22, 1985.

The following news item appeared in the same paper the day after the Florida Supreme Court rendered its decision:

> The ruling came down just thirty minutes before Senate President, Harry Johnston, D-West Palm Beach, was to meet some of those groups to hammer out compromise legislation on MRTA - the compromise in which the state would have relinquished much of the land which the court ruling lets the public keep.
>
> "I think we are all extricated from a tough political decision to make, and I'm very glad they made it for us," said Johnston who is running for governor.
>
> He said he doubted even if the Senate compromise would have passed the House. House leaders were supporting a more conservative approach by Representative Fred Dudley, R-Ft. Myers, that would have left the land in private hands but codified the state's right to regulate the use of the waters.

Florida Times Union, May 16, 1986.

much less by the Florida Supreme Court. This Court is the only forum in which this grievous wrong may be redressed.

CONCLUSION

This case demonstrates in sharp and uncompromising form the need to define the constitutional limits on the power of a state court to alter and amend its own common law of property and to give its decisions retroactive effect. Amicus recognizes that it would be wholly inappropriate to adopt a constitutional principle that would preclude natural development of the common law. But this is not that kind of case. Here the Florida court, by sheer fiat, has changed the rules of the game in midcourse for the benefit of the state. By misreading and ignoring its own unambiguous precedents, the court has retroactively decreed a wholesale confiscation of longheld vested rights. If it is allowed to succeed in this effort, other courts will be tempted to follow in its footsteps. A writ of certiorari should issue so that this Court can make it clear that constitutional prohibitions against state confiscation remain firm. The cloud this decision places on the title to nearly two-thirds of the privately-owned land in Florida must be lifted.

For the reasons stated, certiorari should be granted to review the decision of the Florida Supreme Court.

Respectfully submitted.

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